Rules of Appellate Procedure would preserve the appeal.") (emphasis added) The court of appeals, however, rejected the first argument and dismissed the appeal for lack of jurisdiction. (R - C). The court did not address Petitioner's second argument. (*See id.*)

The Texas Supreme Court granted Petitioner's petition for review. In her petition for review, Petitioner argued, in addition to the matters asserted in the court of appeals, that she had suffered ineffective assistance of counsel in perfecting her appeal, and therefore the dismissal of her appeal resulted in a constitutional deprivation of due process which the Texas Supreme Court must correct by either (a) holding the amended statute requiring an accelerated appeal to be unconstitutional as applied to an appellant in a termination case who suffers ineffective assistance of counsel; or (b) provide a mechanism for an out of time appeal similar to the judicially created procedure existing for criminal cases in Texas when the defendant does not timely perfect an appeal due to ineffective assistance of counsel.

Notwithstanding that (1) Petitioner did not suffer a constitutional deprivation until her appeal was dismissed by the Beaumont Court of Appeals, and (2) Texas procedure does not require a motion for rehearing to the court of appeals to preserve an issue for the supreme court,[2] the Texas high court nonetheless ruled that Petitioner could not assert her constitutional claim in the supreme court because it had not been asserted in the court of appeals. Moreover, the court abandoned its traditional view of finding appellate jurisdiction when any arguable interpretation of the rules would allow, and determined that the time period for an accelerated appeal could

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[2]*See* TEX. R. APP. P. 49.9 ("A motion for rehearing is not a prerequisite to filing a petition for review in the Supreme Court . . . nor is it required to preserve error.").

not be extended by a post-judgment motion (despite an earlier opinion stating that such a construction was a plausible interpretation of the rules[3]). The Texas Supreme Court therefore upheld the judgment of the court of appeals dismissing the appeal. As a result, Petitioner was deprived, through ineffective assistance of counsel, of any right to appeal the termination of her parental rights.

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[3]*See Hone v. Hanafin*, 104 S.W.3d 884, 887-88 (Tex. 2003) (reserving the question of whether a request for findings [one of the four time-extending pleadings] extends the deadline for an accelerated appeal, but stating that the petitioners in that case "could have plausibly assumed that their request for findings of fact and conclusions of law would extend the time for filing a notice of [an accelerated] appeal.")

REASONS FOR GRANTING THE PETITION

A. *The Texas Scheme of Accelerating Appeals in Parental Termination Cases Implemented in 2001 Deprives Parents of Appellate Rights in Violation of the Fourteenth Amendment When the Failure to Timely Appeal Arises from Ineffective Assistance of Counsel.*

It has long been recognized that the termination of parental rights implicates the most fundamental of rights. *In re G.M.*, 596 S.W.2d 846, 847 (Tex. 1980).

> [T]he natural right between parents and their children is one of constitutional dimensions. The termination of this right is complete, final, and irrevocable. It divests forever the parent and child of all legal rights, privileges, duties, and powers between each other except for the child's right to inherit. . . . For these reasons the proceedings below must be strictly scrutinized.

Id. (citations omitted). "[W]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *Id.* (quoting *Santosky v. Kramer*, 455 U.S. 745, 753-54). It is because of the fundamental right at stake in termination cases that due process demands an elevated standard of proof at trial, and a heightened standard of review on appeal. *See Santosky*, 455 U.S. at 769 (holding due process requires clear and convincing evidence standard); *In re G.M.*, 596 S.W.2d at 847 (same); *see also In re J.F.C.*, 96 S.W.3d 256, 264-64 (Tex. 2002) (holding traditional no evidence standard of review on appeal is insufficient to comport with due process in termination cases).

The fundamental nature of the parent-child relationship also has implications for appellate procedure. Although there is

no constitutional right to an appeal per se, once a state establishes an appellate procedure it may not unreasonably restrict access to the appellate courts. As this Court has explained, "[T]he States are [not] required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *M.L.B. v. S.L.J.*, 519 U.S. 102, 111 (1996) (quoting *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966)). Thus, "because Texas provides the right of an appeal from a judgment on parental-rights termination, part of the process of ensuring the accuracy of judgments necessarily involves appellate review." *In re M.S.*, 115 S.W.3d 534, 546-47 (Tex. 2003).

Accordingly, less than a year before the present appeal, the Texas Supreme Court confirmed that an indigent parent's right to counsel in termination proceedings embodies a right to effective assistance of counsel. *In re M.S.*, 115 S.W.3d at 544. In that case, the Texas Supreme Court reversed the court of appeals, holding that "if counsel's failure to preserve a factual sufficiency complaint is unjustified, then counsel's incompetency in failing to preserve the complaint raises the risk of erroneous deprivation too high, and our procedural rule governing factual sufficiency preservation must give way to constitutional due process considerations." *Id.* at 549. The court found this result to follow from this Court's precedent, reasoning that once appellate review is permitted by a state, it must be permitted and effective for all appellants.

The present case raises an even more serious risk of erroneous deprivation of appellate rights than the one faced in *M.S.* This case presents the failure to secure *any* appellate review, as opposed to the mere failure to preserve a factual sufficiency point. The procedural anomaly buried in section 109.002(a) of the Family Code, over which Petitioner's counsel stumbled, "must give way to constitutional due process considerations." Petitioner's appeal should be heard on the

merits.

In its decision in this case, the Texas Supreme Court confirmed that Petitioner, because of the erroneous advice she received from trial counsel, was unsuccessful in invoking the jurisdiction of the appellate court because she did not timely file a notice of appeal. It is therefore beyond question that Petitioner suffered ineffective assistance of counsel. Trial counsel's performance was deficient and Petitioner's appellate rights were compromised as a result.

Petitioner's trial counsel, however, was not the first to fall victim to amended section 109.002(a). Petitioner's attorney is merely one of the recent in an ever growing number. Prior to the argument in this case before the Texas Supreme Court, over twenty appeals had been dismissed, in whole or in part based on lack of jurisdiction caused by the amendment. (*See* Appendix 4).[4] As evidenced by this growing list, a significant problem exists with the new appellate procedure Texas has implemented for accelerating appeals in parental termination cases. The system all too frequently ends up accelerating appeals only by causing unsuccessful defendants to forfeit their appellate rights.

The case of *In re B.G.*, 104 S.W.3d 565 (Tex. App.--Waco 2002, no pet.) (order), is a near-miss that illustrates the arbitrary impact of section 109.002(a). In that case, the Texas Department of Protective and Regulatory Services filed a motion to dismiss the mother's appeal for want of jurisdiction because, among other things, her notice of appeal was untimely. The court denied the motion, but only because the mother had fortuitously filed her notice of appeal within the fifteen-day "grace" period, following the initial 20 days, for requesting an

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[4] Many additional cases have been dismissed relying solely on a similar, but broader, amendment to section 263.405 of the Family Code. This provision is limited to appeals involving the placement of children under the care of the Texas Department of Protective and Regulatory Services. *See* TEX. FAM. CODE, § 263.405(a).

extension. *See* TEX. R. APP. P. 26.3. The court noted that the mother's counsel, like scores of other Texas practitioners -- including the one representing Petitioner at trial -- "explained that he did not realize that the Legislature had amended the pertinent statutes to make this appeal accelerated. He mistakenly believed that the motion for new trial extended the time for the filing of the notice of appeal (which it would have done under prior law)." *In re B.G.*, 104 S.W.3d at 567.

And it is easy to understand why this happens in case after case. First is the obscurity of the provision. In no other area of Texas law are the acceleration provisions of the appellate rules incorporated by reference into a substantive code, without any reference to the acceleration statute in the rules of appellate procedure. In all other Texas appeals, civil and criminal, trial counsel can look to the appellate rules to determine whether a post-trial motion is sufficient to extend the deadline for filing a notice of appeal. *See* TEX. R. APP. P. 26.1(a) (civil); TEX. R. APP. P. 26.2(a)(2) (criminal). There is simply no reason for the practitioner to think the Family Code provides an exception, and indeed, until 2001, it did not.

Second, termination cases are likely to have appointed counsel (or pro bono counsel) at trial, who are unlikely to handle the case beyond trial. Commonly, new counsel is appointed for the appeal. Typical is the recent case of *Sosa v. Texas Dep't of Protective Servs.*, No. 03-04-00351-CV, 2004 Tex. App. LEXIS 6833, *2-4 (Tex. App. – Austin, July 29, 2004, no pet.). The court noted, "Appellant explains that new counsel was appointed for him on May 24, 2004, and that the failure to meet appellate deadlines was not appellant's fault." May 24, however was after the accelerated appellate deadline had expired, and trial counsel's attempt to extend the appellate deadline by filing a motion for new trial was unavailing. Thus, the court of appeals determined it had no choice but to dismiss the appeal for lack of jurisdiction.

The frequent delay in the appointment of new counsel,

together with the mechanics of transferring representation, creates a treacherous problem for missed appellate deadlines under the best of circumstances. As is evident by cases such as *Sosa*, the potential for mishap is compounded exponentially by the acceleration requirement of the 2001 amendment.

An analogous situation has long existed in criminal law, where new counsel is frequently appointed for purposes of appeal. Confusion often exists as to whether-trial counsel or appellate counsel is to advise the defendant of his appellate rights or file a motion for new trial to extend the appellate timetable, and the indigent criminal defendant ends up losing his or her appellate rights as a result. Courts with criminal jurisdiction, however, have fashioned a common law remedy to address this problem as part of their habeas jurisprudence. That remedy, of course, is the "out-of-time appeal." *See, e.g., Ex parte Axel*, 757 S.W.2d 369 (Tex. Crim. App. 1988). Appellants in termination cases who have stumbled on the 2001 amendment have repeatedly sought an out-of-time appeal from the Texas courts of appeal, clearly attempting to borrow from criminal procedure. *See, e.g., In re K.G.*, No. 11-04-00086-CV, 2004 Tex. App. LEXIS 3378 (Tex. App. – Eastland April 15, 2004, no pet. h.); *In re M.E.P.*, No. 01-03-00796-CV, 2004 Tex. App. LEXIS 2312 (Tex. App. – Houston [1st Dist.] March 11, 2004, no pet. h.). These efforts have been rebuffed in each instance. This is not surprising since the intermediate appellate courts may not grant out-of-time appeals in criminal cases. *See, e.g., Smith v. State*, Nos. 05-03-00634-CR & 05-03-00635-CR, 2003 Tex. App. LEXIS 4265, *1 n.1 (Tex. App. – Dallas May 20, 1993, no pet.). This duty is reserved for the highest court in Texas for criminal cases, the Court of Criminal Appeals. *Id.*

The Appellate Division of the Superior Court of New Jersey was faced with a strikingly similar case. *See New Jersey Div. of Youth and Family Servs. v. R.G.*, 806 A.2d 408 (N.J. Super. Ct. App. Div. 2002). The New Jersey case involved a mother suffering from a "chronic paranoid schizophrenic

disorder" whose parental rights were terminated. *Id.* at 409. (Petitioner was accused, we believe incorrectly, of suffering from a similar condition). Less than a month after the termination of her parental rights, the mother executed a form provided by the Office of the Public Defender which "acknowledged her right to appeal" the termination, "specifically signified her desire to appeal," and "requested representation thereon from the Office of the Public Defender." *Id.* at 410.

Evidently, the Office of the Public Defender simply forgot to appeal on the mother's behalf. Nearly a year after the entry of the order terminating her parental rights, the mother called the Office of the Public Defender to inquire about the status of her appeal. At that point, the Office of the Public Defender realized no appeal had been filed. It then filed a "motion for leave to file a notice of appeal *nunc pro tunc*," the New Jersey equivalent of an out-of-time appeal. *See id.*

The court noted that two of the mother's children had been residing "in their current foster placements for a period in excess of four years," and that her youngest child had resided in a foster home "since shortly after her birth." *Id.* The court also acknowledged that the mother waited for "an extended period of time before inquiring as to the status of her case," possibly due to "parental indifference." *Id.* at 411.

Nevertheless, the court concluded that the appellate timetable "should be relaxed" and the mother "granted leave to file a notice of appeal *nunc pro tunc*." *Id.* at 413. The court explained that the trial court's order "severed [the mother's] parental relationship forever with her three children, a far-reaching and severe consequence of constitutional dimension." *Id.* at 412 (citing, *inter alia*, *Santosky v. Kramer*, 455 U.S. 745 (1982)). Moreover, the court recognized that "the appeal process for indigent criminal and indigent guardianship appeals is parallel, embodying similar procedural due process values." *Id.* In criminal cases, the court said, a "defendant's timely

request of counsel to file an appeal on his or her behalf ... obligates us to relax [the appellate timetable] and grant leave [to appeal] irrespective of the lateness of the hour." *Id.* at 411.

The federal courts also have dealt with similar ineffective assistance issues in immigration cases. In appropriate cases, federal courts have applied an "equitable tolling" doctrine to suspend the running of appellate deadlines during periods of ineffective assistance of counsel. *See, e.g., Iavorski v. INS*, 232 F.3d 124, 127, 134 (2d Cir. 2000). Thus, the appellate deadline is deemed never to have expired.

The appellate rights in parental termination cases are no less important. This Court should grant the petition in this case to consider whether the 2001 amendment to the Texas Family Code is unconstitutional as applied for violating Petitioner's rights to due process pursuant to the United States Constitution.[5]

When tested against the standard established by this Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Texas procedure does not fare well. *Mathews* requires weighing three factors -- the private interests at stake, the government's interest in the proceeding, and the risk of erroneous deprivation of parental rights -- and balancing the net result against the presumption that the procedural rule in question comports with constitutional due process. 424 U.S. at 335.

In applying the *Mathews* factors, it is instructive to analyze the current case against the case of *In re M.S.* in which the Texas Supreme Court found federal due process to be lacking because counsel had failed to preserve for review a "factual sufficiency of the evidence" point of error. *See In re M.S.*, 115 S.W.3d at 549. In considering the first factor -- the private interests at stake -- the court held that "the parent's fundamental liberty interest in maintaining custody and control

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[5] U.S. CONST. amend. XIV, § 1.

of his or her child, the risk of permanent loss of the parent-child relationship, and the parent's and child's interest in a just and accurate decision, all weigh heavily in favor of permitting a factual sufficiency review when counsel has unjustifiably failed to preserve it." *Id.* at 548.

In the present case, Petitioner's fundamental liberty interest is identical to that of the mother in *M.S.* (and indeed all parents). The State has deprived a mother of her youngest child; a baby has been deprived of her natural mother, as well as her three older siblings. And unlike the mother in *M.S.*, Petitioner has lost more than a mere factual sufficiency review (almost always denied on appeal); she has lost the right to *any* appellate review of the termination of her parental rights. Hence, her interest weighs even more heavily in favor of permitting her appeal than for the mother in *M.S.*

Concerning the second factor -- the government's interest in the proceeding -- the Court in *M.S.* recognized that "the State's fundamental interest in parental-rights termination cases is to protect the best interest of the child." *Id.* The State also has "an interest in the economical and efficient resolution of parental-rights termination cases" and "in the consistent and uniform application" of procedural rules. *Id.* Nevertheless, "the State's interest in protecting the welfare of the child must initially manifest itself by working toward *preserving* the familial bond, rather than severing it." *Id.* (citing *Santosky v. Kramer*, 455 U.S. 745 (1982) (emphasis in original)). Therefore, "the State's initial interest in maintaining the familial bond versus its interest in maintaining procedural integrity weighs in favor of permitting a factual sufficiency review when counsel unjustifiably fails to follow those procedures." *Id.* at 549.

As in *M.S.*, the State in the present case certainly has an interest in the "consistent and uniform application" of its procedural rules: in this case, a rule facilitating speedy resolution of termination proceedings. However, the goal of

speed and efficiency cannot justify arbitrary and "unreasoned distinctions that can only impede open and equal access to the courts." *M.L.B. v. S.L.J.*, 519 U.S. 102, 111 (1996).[6] Therefore, as in *M.S.*, "the State's initial interest in maintaining the familial bond" versus its interest in speed and efficiency weighs in favor of permitting Petitioner's appeal.

Further, the manner in which Texas has chosen to achieve speed and efficiency -- incorporating by reference the appellate rules for accelerated appeals into the Family Code -- risks grave error. This awkward procedure has demonstrably and arbitrarily deprived parent after parent of their appellate rights. (*See* Appendix 4). And given that Texas was able to live without this change until 2001, the importance of utilizing this particular method cannot be great.

Regarding the third factor -- the risk of erroneous deprivation -- the court in *M.S.* noted that "termination of parental rights is dramatic, permanent, and irrevocable. This fact has been pivotal for the United States Supreme Court. And it is to us. For this reason, *any significant risk* of erroneous deprivation is unacceptable." *In re M.S.* at 549 (emphasis added). The court went on to observe that "we cannot think of a more serious risk of erroneous deprivation of parental rights than when the evidence, though minimally existing, fails to

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[6] *M.L.B.* involved an appeal by an indigent mother whose parental rights had been terminated. A procedural rule required her to pay over $2000 for the record. The Court held that this requirement violated constitutionally-required access to appeal in termination cases. Significantly, the Court began its analysis with *Griffin v. Illinois*, 351 U.S. 12 (1956), a criminal case. Describing *Griffin* as the "foundation case" ensuring access to appeal, *M.L.B.*, 519 U.S. at 110, the Court gave impetus to the prevailing trend of extending criminal law protections to termination proceedings. *See generally* Michael D. Bustamante, *Incorporating the Law of Criminal Procedure in Termination of Parental Rights Cases: Giving Children a Voice through* Mathews v. Eldridge, 32 NEW MEXICO L. REV. 143 (Spr. 2002).

clearly and convincingly establish in favor of jury findings that parental rights should be terminated." *Id.*

When judged against the test in *Mathews*, the amendment to section 109.002(a) should be held unconstitutional as applied in termination cases when the defendant suffers ineffective assistance of counsel that causes the filing of a late notice of appeal. The present statute works to deprive parents of fundamental appellate rights in a cruel, arbitrary, and unfair fashion, causing defendants to suffer due to wholly predictable lapses on the part of trial counsel. Because of the fundamental value at stake in terminating the parent-child relationship, and the frequency with which parents have been deprived of their right to appellate review in Texas since the 2001 amendment, this Court should grant the petition to determine the constitutionality of the Texas procedure.

B. *The Federal Constitutional Issue was Preserved Below.*

The Texas Supreme Court analogized to preservation of error rules applicable to the trial court in concluding that Petitioner had waived her constitutional arguments by not presenting them to the Beaumont Court of Appeals. This is an imperfect analogy that is inapplicable to ineffective assistance of counsel on appeal and should not have been applied in the first instance to Petitioner.

As noted in the opinion of the Beaumont Court of Appeals, that court by letter informed the parties that jurisdiction *appeared* to be lacking. It did not, as the Texas Supreme Court stated in its opinion, "inform[] Carroll that her appeal was untimely." (*See* Appendix 2) Consistent with the Texas Supreme Court's admonition in *Verburgt*, Petitioner responded to the court's question by providing an arguable interpretation of the appellate rules that would preserve jurisdiction. Petitioner had every expectation that her construction of the rules would prevail, particularly given the

Texas Supreme Court's statement in a prior case that this construction of the rules was plausible. Nonetheless, after receiving Petitioner's response, the Beaumont Court issued its opinion holding that the appeal was untimely. It was only at that point did the potential for a constitutional issue arise, and then only if the Texas Supreme Court agreed with the Beaumont Court. Prior to the dismissal, there was no constitutional deprivation of appellate rights. Stated differently, until it was finally determined by the Texas Supreme Court that Petitioner's appeal was not timely, Petitioner had suffered no injury from ineffective assistance of counsel. The issue was at best hypothetical. Therefore, the first clear opportunity to present the federal constitutional challenge was to the Texas Supreme Court.

It is true, as the Texas Supreme Court noted, that Petitioner did not raise her constitutional arguments in her motion for rehearing in the Court of Appeals. Of course, Petitioner was not required to file *any* motion for rehearing to preserve error. TEX. R. APP. P. 49.9 ("A motion for rehearing is not a prerequisite to filing a petition for review in the Supreme Court . . . nor is it required to preserve error."). Therefore, Petitioner cannot be faulted for not raising the federal constitutional argument in her motion for rehearing to the Beaumont court. Rather, the motion directed the court to a second argument concerning the construction of the Texas appellate rules that the Beaumont Court had not considered in its opinion. A motion for rehearing is simply not an error preserving instrument in Texas appellate practice.

Further, it is unjust to require counsel to have raised the federal constitutional issue before the Beaumont court because the issue is new and novel, it has not previously been considered or recognized by Texas courts, and to have raised it before an intermediate appellate court would have been futile. The following passage from Judge Campbell's concurrence in *Black v. State* is instructive here:

The novelty aspect of the "right not recognized" doctrine was best articulated in *Reed v. Ross*, 468 U.S. 1 (1984). In *Reed*, the Supreme Court held that the "cause" prong of the "cause and prejudice" test for obtaining federal habeas relief could be satisfied when the procedural failure of counsel to raise a constitutional issue was not the result of a tactical decision made by competent counsel, but occurred because the constitutional issue was "reasonably unknown to him" at the time of trial. If counsel had no "reasonable basis upon which to formulate a constitutional question," then this Court could not "attribute to him strategic motives of any sort." *Id.* at 14-15. Furthermore, this Court found that the truly novel claim could be excused without implicating any of the articulated reasons for requiring meticulous preservation of error.

Just as it is reasonable to assume that a competent lawyer will fail to perceive the possibility of raising such a claim, it is also reasonable to assume that a court will similarly fail to appreciate the claim. It is the nature of our legal system that legal concepts, including constitutional concepts, develop slowly, finding partial acceptance in some courts while meeting rejection in others. Despite the fact that a constitutional concept may ultimately enjoy general acceptance, . . . when the concept is in its embryonic stage, it will, by hypothesis be rejected by most courts. Consequently, a rule requiring a defendant to raise a truly novel issue is not likely to serve any functional purpose. Although there is a remote possibility that a given state court will be the first to discover a latent constitutional issue and to order redress if the issue is properly raised, it is far more likely that the court will fail to appreciate the claim and reject it out of hand. *Id.* at 15.

> In addition, requiring novel claims to be routinely raised could "actually disrupt state-court proceedings by encouraging defense counsel to include any and all remotely plausible constitutional claims that could, some day, gain recognition." *Id.* at 16.

Black v. State, 816 S.W.2d 350, 368-69 (Tex. Crim. App. 1991) (Campbell, J., concurring).

At the time of Petitioner's response in the Court of Appeals, the ink was barely dry on the Texas Court's order denying rehearing in *In re M.S.*, 115 S.W.3d 534, 544 (Tex. 2003), which for the first time in Texas recognized an ineffective assistance claim in a civil case.[7] It is on the basis of that right that the constitutional claim for an out-of-time appeal logically followed in the present case. Raising the issue of an out-of-time appeal in the Court of Appeals, however, would have been futile, as evident by the many dismissals noted in Petitioner's Appendix 4.

Moreover, the need to raise such claims in the court of appeals presents new law, as evident from the lack of citation to any applicable precedent by the Texas Supreme Court in its opinion. It is unjust to apply the new preservation rule to Petitioner retroactively.

The ultimate irony in this case, of course, is the legislative assumption that accelerating the time to *perfect* an appeal will have any material effect on accelerating the *disposition* of an appeal. Preparation of the record, briefing the appeal, scheduling argument, and opinion writing are by far the

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[7]This is an issue with which many states have only recently begun to struggle. *See generally* Susan Calkins, *Ineffective Assistance of Counsel in Parental-Rights Termination Cases: The Challenge for Appellant Courts*, 6 THE JOURNAL OF APPELLATE PRACTICE AND PROCESS 179-235 (Fall 2004).

more time consuming aspects of an appeal and are much more likely to cause delay in disposition than perfecting the appeal. The blunt tool of accelerating the time to perfect does very little to speed the time of disposition. In practice, it aides in disposition only when it robs an appellant of the opportunity to appeal because of the missed deadline. That is not a reasonable and just method for accelerating appeals; indeed, it is an unconstitutional deprivation of appellate rights when a defendant suffers ineffective assistance of counsel. And it will occur more and more if the Texas Legislature is encouraged to add yet more acceleration traps to substantive areas of law.

The Texas Supreme Court chose to avoid addressing this serious constitutional issue by lying behind a dubious preservation rationale. Because the Texas courts have shown themselves to be willing participants in a fundamentally unfair procedural scheme that acts to deprive parents of their right to appeal in termination cases, this Court is truly Petitioner's last resort to obtain the appellate review to which she is entitled.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

INDEX TO APPENDIX

APPENDIX 1 - Opinion of the Supreme Court of Texas
(A 1 – 1-11)

APPENDIX 2 - Opinion of the Texas Court of Appeals, Ninth District of Texas at Beaumont
(A 2 – 1-2)

APPENDIX 3 - Order of the Texas Supreme Court on Motion for Rehearing
(A 3 – 1)

APPENDIX 4 - Out-of-time Dismissals Citing Texas Family Code Section 109.002(a) (As Amended 2001)
(A 4 – 1-3)

APPENDIX 1
Opinion of the Supreme Court of Texas

IN THE SUPREME COURT OF TEXAS

NO. 04-0493

IN THE INTEREST OF K.A.F., A CHILD

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE NINTH DISTRICT OF TEXAS

Argued February 16, 2005

JUSTICE O'NEILL delivered the opinion of the Court.

In this case, we must decide whether the rules of appellate procedure permit post-judgment motions to extend the appellate deadline for filing an accelerated appeal. We hold that they do not. We further hold that filing a motion for new trial may not be considered a bona fide attempt to invoke the appellate court's jurisdiction. Accordingly, we affirm the court of appeals' judgment.

I

Louis Faucheaux petitioned the trial court to involuntarily terminate Susan Carroll's[1] parental rights to their daughter, K.A.F. The jury found that Carroll's rights should be

[1]In the trial court and court of appeals, Ms. Carroll was referred to as Susan Carroll Capps. In her filings in this Court, she states that she is now known as Susan Carroll; we will refer to her accordingly.

terminated, and the trial court signed a final order of termination on November 3, 2003. On November 10, 2003, Carroll filed a "Motion for New Trial: Alternatively, Motion to Modify the Judgment," which the trial court denied a week later. Carroll filed a notice of appeal on January 16, 2004, seventy-four days after the trial court signed its final order.

The court of appeals dismissed the appeal for want of jurisdiction, holding that, because Carroll's notice of appeal was filed more than twenty days after the judgment was signed, the notice was untimely under Texas Rule of Appellate Procedure 26.1(b), which governs accelerated appeals and applies to parental rights termination cases. ___ S.W.3d ___. We granted Carroll's petition for review to determine whether the court of appeals' dismissal was proper.

II

Texas Rule of Appellate Procedure 26.1 sets out the time to perfect an appeal in civil cases:

RULE 26. TIME TO PERFECT APPEAL

26.1. Civil Cases

The notice of appeal must be filed within 30 days after the judgment is signed, except as follows:

(a) the notice of appeal must be filed within 90 days after the judgment is signed if any party timely files:

(1) a motion for new trial;

(2) a motion to modify the judgment;

(3) a motion to reinstate under Texas Rule of Civil Procedure 165a; or

(4) a request for findings of fact and conclusions of law if findings and conclusions either are required by the Rules of Civil Procedure or, if not required, could properly be considered

by the appellate court;

(b) in an accelerated appeal, the notice of appeal must be filed within 20 days after the judgment or order is signed;

(c) in a restricted appeal, the notice of appeal must be filed within six months after the judgment or order is signed; and

(d) if any party timely files a notice of appeal, another party may file a notice of appeal within the applicable period stated above or 14 days after the first filed notice of appeal, whichever is later.

TEX. R. APP. P. 26.1. With this rule in place, the Legislature enacted section 109.002 of the Family Code, which provides in pertinent part:

> An appeal in a suit in which termination of the parent-child relationship is in issue shall be given precedence over other civil cases and shall be accelerated by the appellate courts. The procedures for an accelerated appeal under the Texas Rules of Appellate Procedure apply to an appeal in which the termination of the parent-child relationship is in issue.

TEX. FAM. CODE ANN. § 109.002(a). Thus, rule 26.1(b) applies to an appeal in a parental rights termination case and requires that the notice of appeal be filed within twenty days after a judgment or order is signed. TEX. R. APP. P. 26.1(b).

Carroll argues, however, that although rule 26.1(b) governs accelerated appeals and sets a twenty-day deadline, rule 26.1(a) should operate to extend the filing deadline to ninety days, even in an accelerated appeal, when a timely motion to modify the judgment is filed. To support her interpretation,

Carroll cites rules 28.1 and 28.2, which provide that appeals from interlocutory orders and quo warranto proceedings are accelerated and that "filing a motion for new trial will not extend the time to perfect the appeal." TEX. R. APP. P. 28.1, 28.2. From this language, Carroll infers that filing one of the other post-judgment motions listed in rule 26.1(a), like a motion to modify the judgment, *will* extend the time to perfect an appeal from those two types of judgments. Carroll then argues that a similar rule should apply to other types of accelerated appeals and that her timely filed motion to modify the judgment thus extended the appellate deadline to ninety days.

We find this argument unpersuasive for several reasons. First, the language of rule 26.1(b) is clear and contains no exceptions to the twenty-day deadline. Second, rules 28.1 and 28.2 specifically apply only to interlocutory orders and quo warranto proceedings, respectively. Finally, as discussed below, before the procedural rules were amended in 1997, it was clear that there was no exception to the accelerated-appeal deadline, and we find no indication that such a major change was intended.

Prior to 1997, the deadlines for perfecting ordinary and accelerated appeals were governed by different rules. Rule 41, governing ordinary appeals, provided:

RULE 41. ORDINARY APPEAL--WHEN PERFECTED

(a) Appeals in Civil Cases.

(1) *Time to Perfect Appeal.* When security for costs on appeal is required, the bond or affidavit in lieu thereof shall be filed with the clerk within thirty days after the judgment is signed, or, within ninety days after the judgment is signed if a timely motion for new trial has been filed by any party or if any party has timely filed a request for findings of fact and

conclusions of law in a case tried without a jury. If a deposit of cash is made in lieu of bond, the same shall be made within the same period.

Former TEX. R. APP. P. 41(a)(1) (1986, amended 1997). Despite the rule's specific reference to motions for new trial and requests for findings of fact and conclusions of law, the courts of appeals were almost entirely uniform in holding that *any* motion requesting a substantive change in the judgment would operate to extend the appellate timetable. *Ramirez v. Williams Bros. Constr. Co.*, 870 S.W.2d 551, 552 (Tex. App.-Houston [1st Dist.] 1993, no writ) (per curiam) (citing *U.S. Fire Ins. Co. v. State*, 843 S.W.2d 283, 284 (Tex. App.-Austin 1992, writ denied), *Miller Brewing Co. v. Villarreal*, 822 S.W.2d 177, 179 (Tex. App.-San Antonio 1991), *rev'd on other grounds*, 829 S.W.2d 770, 35 Tex. Sup. Ct. J. 704 (Tex. 1992), *Home Owners Funding Corp. v. Scheppler*, 815 S.W.2d 884, 887 (Tex. App.-Corpus Christi 1991, no writ), and *Brazos Elec. Power Coop., Inc. v. Callejo*, 734 S.W.2d 126, 129 (Tex. App.-Dallas 1987, no writ)). *Contra First Freeport Nat'l Bank v. Brazoswood Nat'l Bank*, 712 S.W.2d 168, 170 (Tex. App.-Houston [14th Dist.] 1986, no writ).

Rule 42, which governed accelerated appeals, provided:

RULE 42. ACCELERATED APPEALS IN CIVIL CASES

(a) Mandatory Acceleration.

(1) Appeals from interlocutory orders (when allowed by law) shall be accelerated. In appeals from interlocutory orders, no motion for new trial shall be filed. . . .

> (2) Appeals in quo warranto proceedings shall be accelerated. In quo warranto, the filing of a motion for new trial shall not extend the time for perfecting the appeal . . . .
>
> (3) In all accelerated appeals from interlocutory orders and in quo warranto proceedings, the bond, or the notice or affidavit in lieu thereof, shall be filed, or the deposit in lieu of bond shall be made, within twenty days after the judgment or order is signed. . . .

Former TEX. R. APP. P. 42(a) (1986, amended 1997). The pre-1997 rules thus provided that, while certain post-judgment motions would extend the appellate deadlines in ordinary appeals, such motions, to the extent they were permitted to be filed at all, did not affect the twenty-day deadline for accelerated appeals.

In 1997, the rules were amended. Former rule 41 is now rule 26, and former rule 42, with the exception of the deadlines to perfect the appeals, is now rule 28. The comments to the amended rules help clarify what substantive changes were intended. The rule 26 (appellate deadlines) comment notes simply:

> This is former Rule 41. All times for perfecting appeal in civil cases--including the time for perfecting a restricted appeal--are stated. An extension of time is available for all appeals. The provisions of former Rule 41(c) regarding prematurely filed documents are moved to Rule 27. Nonsubstantive changes are made in the rule for criminal cases.

TEX. R. APP. P. 26 cmt. The rule 28 (accelerated appeals) comment states:

> This is former Rule 42. A motion for new trial is now permitted in an appeal from an interlocutory order, but it does not extend the time to perfect appeal. The deadlines for filing items in an accelerated appeal are moved to other rules. *See* Rules 26.1, 35.1 [appellate record] and 38.6 [appellate briefs]. Former Rule 42(b), regarding discretionary acceleration, is omitted as unnecessary. *See* Rule 40.1. The provision in former Rule 42(c) allowing the court to shorten the time to file briefs is omitted as unnecessary. *See* Rule 38.6.

TEX. R. APP. P. cmt. Thus, the key changes with regard to the deadline for perfecting appeals were: (1) all deadlines for perfecting appeals in civil cases were moved to a single rule (rule 26); (2) an extension of time was made available for all appeals on proper motion to the court of appeals, *see* TEX. R. APP. P. 26.3; and (3) motions for new trial could now be filed in interlocutory appeals, but, as was already the case in quo warranto proceedings, such motions would not extend the appellate deadlines.

We find nothing in either the language of the amended rules or the comments thereto that would support Carroll's interpretation, which would have constituted a major change from the pre-1997 version. Significantly, the fact that former rule 42 specifically provided that filing a motion for new trial would not extend the deadline in quo warranto proceedings did *not* imply that filing other post-judgment motions would extend the deadline. Former TEX. R. APP. P. 41, 42. We see no reason to read such an implication into the same language in the amended rules. In an ordinary civil appeal in which the deadline

to file the notice of appeal is otherwise thirty days after the judgment or order is signed, filing one of the post-judgment motions identified in rule 26.1(a) extends the deadline to ninety days. But we hold that in an accelerated appeal, absent a rule 26.3 motion, the deadline for filing a notice of appeal is strictly set at twenty days after the judgment is signed, with no exceptions, and filing a rule 26.1(a) motion for new trial, motion to modify the judgment, motion to reinstate, or request for findings of fact and conclusions of law will not extend that deadline. Allowing such post-order motions to automatically delay the appellate deadline is simply inconsistent with the idea of accelerating the appeal in the first place. Because Carroll did not file a motion for extension of time under rule 26.3 and her notice of appeal was not filed within twenty days after the trial court signed the final order terminating her parental rights, her notice of appeal was untimely and failed to invoke the jurisdiction of the court of appeals.

III

We turn to Carroll's alternative argument that, even if her notice of appeal was untimely, her motion for new trial, which was filed within twenty days after the judgment was signed, was sufficient in itself to perfect an appeal. The court of appeals did not address this argument.

Carroll relies on the well-settled proposition that a court of appeals has jurisdiction over an appeal if the appellant timely files an instrument in a bona fide attempt to invoke the appellate court's jurisdiction. *E.g.*, *Grand Prairie Indep. Sch. Dist. v. S. Parts Imps., Inc.*, 813 S.W.2d 499, 500, 34 Tex. Sup. Ct. J. 743 (Tex. 1991); *see also Verburgt v. Dorner*, 959 S.W.2d 615, 616, 41 Tex. Sup. Ct. J. 138 (Tex. 1997) (reaffirming the principle that "appellate courts should not dismiss an appeal for a procedural defect whenever any arguable interpretation of the Rules of Appellate Procedure would preserve the appeal"). In support of her specific contention that a motion for new trial can operate to perfect an

appeal, Carroll cites *In re M.A.H.*, 104 S.W.3d 568, 570 (Tex. App.-Waco 2002, no pet.). There, the court held, as we do today, that the mother's motion for new trial did not extend the due date for her notice of appeal. *Id.* at 569. But a divided court held that the appellant's motion for new trial could be treated as an instrument that was filed in a "bona fide attempt" to invoke the court's jurisdiction. *Id.* That holding has been criticized by a number of other appellate courts, with whom we agree. *Cf. Chambers Enters. v. 6250 Westpark, LP*, 97 S.W.3d 333, 334 (Tex. App.-Houston [14th Dist.] 2003, pet. denied); *In re J.N.W.*, ___ S.W.3d ___, ___, (Tex. App.-Tyler 2003, no pet.); *Lane v. Burkett*, No. 13-04-290-CV, 2004 WL 1687913 at *1 (Tex. App.-Corpus Christi July 29, 2004, no pet.).

In *Grand Prairie*, we held that a court of appeals may not dismiss an appeal in which the appellant filed the wrong instrument required to perfect the appeal without giving the appellant an opportunity to correct the error, as long as the instrument was timely filed in a bona fide attempt to invoke the appellate court's jurisdiction. 813 S.W.2d at 500. Filing a motion for new trial, however, simply does not qualify as such an attempt. As the dissent noted in *In re M.A.H.*,

> Seldom, if ever, could a motion for new trial be intended to invoke [the court of appeals'] jurisdiction, because the express purpose of a motion for new trial is just that, to have the trial court order a new trial, not to obtain appellate review of the judgment. Even if . . . a motion for new trial was a necessary predicate to bring an issue on appeal, the motion for new trial would have been properly characterized as a prerequisite to an appeal, not an effort to invoke appellate jurisdiction.

104 S.W.3d at 571 (GRAY, J., dissenting); *see also Besing v. Moffitt*, 882 S.W.2d 79, 82 (Tex. App.-Amarillo 1994, no writ) (filing a request for findings of fact and conclusions of law insufficient to perfect an appeal under *Grand Prairie*). Though there are myriad reasons why a party might file a motion for new trial, we fail to see how invoking the court of appeals' jurisdiction could reasonably be considered one of them. Indeed, because filing a motion for new trial *extends* the deadline to file a notice of appeal in most civil cases, TEX. R. APP. P. 26.1(a), a motion for new trial logically cannot also serve as a *substitute* for a notice of appeal.

We conclude that a motion for new trial is not an instrument that may be considered a bona fide attempt to invoke the appellate court's jurisdiction under the *Grand Prairie* and *Verburgt* line of cases. We therefore hold that, although Carroll's motion for new trial was timely filed and preserved her request for a second chance in the trial court, it did not operate to timely perfect her appeal.

IV

Finally, Carroll raises two constitutional issues should we hold, as we have, that her appeal was untimely. First, Carroll contends she received ineffective assistance of counsel and should be allowed to pursue an out-of-time appeal. Second, she argues section 109.002 of the Family Code, which provides that appeals in parental rights termination cases shall be accelerated and governed by the rules of appellate procedure for accelerated appeals, is unconstitutional as applied. However, Carroll waived these arguments by failing to raise them in the court of appeals.

After the court of appeals informed Carroll that her appeal was untimely, she filed a "Brief on the Issue of Jurisdiction" in the court of appeals. She also filed a motion for rehearing after the court dismissed her appeal. In none of her filings with the court of appeals did Carroll raise any constitutional arguments. We have held that the rules governing

error preservation must be followed in cases involving termination of parental rights, as in other cases in which a complaint is based on constitutional error. *In re B.L.D.*, 113 S.W.3d 340, 350-51, 46 Tex. Sup. Ct. J. 978 (Tex. 2003) (fundamental-error doctrine does not apply to procedural preservation rules, nor does due process require appellate review of unpreserved complaints in parental rights termination cases); *Tex. Dep't of Protective & Regulatory Servs. v. Sherry*, 46 S.W.3d 857, 861, 44 Tex. Sup. Ct. J. 672, 44 Tex. Sup. Ct. J. 767 (Tex. 2001) (failure to assert constitutional claim in trial court bars appellate review of claim). While Carroll's constitutional complaints relate to her appeal and therefore could not have been asserted in the trial court, she was required to raise them in the court of appeals in order to preserve error. Because she did not, her constitutional complaints are waived.

* * * *

We hold that, when an appeal is accelerated, the deadline for filing a notice of appeal under Texas Rule of Appellate Procedure 26.1(b) is twenty days after the judgment or order is signed, and the post-judgment motions listed in Texas Rule of Appellate Procedure 26.1(a) will not operate to extend the appellate deadline. We also hold that filing a motion for new trial does not constitute a bona fide attempt to invoke the court of appeals' jurisdiction for purposes of perfecting an appeal. Accordingly, we affirm the court of appeals' judgment dismissing the appeal for want of jurisdiction.

Harriet O'Neill
Justice

OPINION DELIVERED: April 8, 2005

APPENDIX 2
Opinion of the Texas Court of Appeals, Ninth District of Texas at Beaumont

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In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-04-028 CV

IN THE INTEREST OF K.A.F.

On Appeal from the 279th District Court
Jefferson County, Texas
Trial Cause No. F-181,705

MEMORANDUM OPINION[1]

On February 5, 2004, we notified the parties that jurisdiction appeared to be lacking, and the appellant filed a response. The judgment terminating the parental rights of the appellant, Susan Carroll Capps, was signed on November 3, 2003. A notice of appeal was filed on January 16, 2004, more than 20 days from the date the judgment was signed and after the time in which an extension of time for filing notice of appeal may be granted. TEX. FAM. CODE ANN. § 109.002; TEX.

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[1]TEX. R. APP. P. 47.4.

R. APP. P. 26.1(b); TEX. R. APP. P. 26.3.

The appellant concedes that her motion for new trial could not function to extend the appellate timetable, but argues that her alternate motion to modify the judgment did extend the timetable because motions to modify judgment are not excluded by TEX. R. APP. P. 28.1. Rule 28.1, which concerns interlocutory orders is simply inapposite in a case where final judgment has been entered. The statute that does apply to this case, Family Code § 109.002, states that "the procedures for an accelerated appeal under the Texas Rules of Appellate Procedure apply to an appeal in which the termination of the parent-child relationship is in issue." TEX. FAM. CODE ANN. 109.002. We note that Section 109.002 does not expressly exclude all post-trial motions, as is the case for suits where the child is in the care of the Department of Protective and Regulatory Services. *See* TEX. FAM. CODE ANN. 263.405 (Vernon 2002). Nevertheless, Section 109.002 mandates the application of the accelerated appellate timetable of Rule 26.1(c) to all termination cases.

The Court finds appellant failed to timely perfect an appeal. The Court further finds that it lacks jurisdiction over this appeal. It is, therefore, ORDERED that this appeal be DISMISSED for want of jurisdiction.

APPEAL DISMISSED.

PER CURIAM

Opinion Delivered March 18, 2004
Before McKeithen, C.J., Burgess and Gaultney, JJ.

APPENDIX 3

Order of the Texas Supreme Court on Motion for Rehearing

[seal]

THE SUPREME COURT OF TEXAS

Orders Pronounced May 13, 2005

ORDERS ON CAUSES

* * *

THE MOTIONS FOR REHEARING OF THE FOLLOWING CAUSES ARE DENIED:

* * *

04-0493 IN THE INTEREST OF K.A.F., A CHILD;
from Jefferson County; 9th district
(09-04-00028-CV, ___ SW3d ___, 03-18-04)

(Justice Johnson not sitting)

APPENDIX 4

Out-of-time Dismissals Citing Texas Family Code Section 109.002(a) (As Amended 2001)

Sosa v. Tex. Dep't of Protective & Regulatory Servs., NO. 03-04-00351-CV , COURT OF APPEALS OF TEXAS, THIRD DISTRICT, AUSTIN, 2004 Tex. App. LEXIS 6833, July 29, 2004

In the Interest of T.L.S. , No. 10-04-00098-CV , COURT OF APPEALS OF TEXAS, TENTH DISTRICT, WACO, 2004 Tex. App. LEXIS 6604, July 21, 2004

In the Interest of W.J.B., No. 11-03-00407-CV, COURT OF APPEALS OF TEXAS, ELEVENTH DISTRICT, EASTLAND , 2004 Tex. App. LEXIS 4798, May 27, 2004

In the Interest of M.E.P., NO. 01-03-00796-CV, COURT OF APPEALS OF TEXAS, FIRST DISTRICT, HOUSTON, 2004 Tex. App. LEXIS 2312, March 11, 2004

In the Interest of K.G., No. 11-04-00086-CV , COURT OF APPEALS OF TEXAS, ELEVENTH DISTRICT, EASTLAND, 2004 Tex. App. LEXIS 3378, April 15, 2004

In the Interest of N. H., No. 07-04-0059-CV , COURT OF APPEALS OF TEXAS, SEVENTH DISTRICT, AMARILLO , 2004 Tex. App. LEXIS 2572, March 23, 2004

In the Interest of K.A.F., No. 09-04-028 CV , COURT OF APPEALS OF TEXAS, NINTH DISTRICT, BEAUMONT, 2004 Tex. App. LEXIS 2447, March 18, 2004

In the Interest of M. T. R., No. 06-04-00019-CV , COURT OF APPEALS OF TEXAS, SIXTH DISTRICT, TEXARKANA , 2004 Tex. App. LEXIS 1215, February 9, 2004

In the Interest of C.M.M.D., No. 10-03-206-CV , COURT OF APPEALS OF TEXAS, TENTH DISTRICT, WACO, 2003 Tex. App. LEXIS 7264, August 20, 2003, Delivered, August 20

In the Interest of J.N.W., No. 12-03-00142-CV , COURT OF APPEALS OF TEXAS, TWELFTH DISTRICT, TYLER, 2003 Tex. App. LEXIS 4645, May 30, 2003

In re B.R.L., No. 06-03-00052-CV , COURT OF APPEALS OF TEXAS, SIXTH DISTRICT, TEXARKANA, 2003 Tex. App. LEXIS 3254, April 15, 2003, Submitted, April 16, 2003

In re C.M.M.D., No. 10-03-063-CV , COURT OF APPEALS OF TEXAS, TENTH DISTRICT, WACO, 2003 Tex. App. LEXIS 2702, March 26, 2003, Delivered, March 26, 2003

Stephenson v. Tex. Dep't of Protective & Regulatory Servs., No. 03-02-00776-CV, COURT OF APPEALS OF TEXAS, THIRD DISTRICT, AUSTIN, 2003 Tex. App. LEXIS 2333, March 20, 2003

In the Interest of H.D.S., No. 12-03-00037-CV , COURT OF APPEALS OF TEXAS, TWELFTH DISTRICT, TYLER, 2003 Tex. App. LEXIS 1504, February 19, 2003

In re C.L.C., No. 12-02-00348-CV , COURT OF APPEALS OF TEXAS, TWELFTH DISTRICT, TYLER, 2002 Tex. App. LEXIS 9078, December 18, 2002

In the Interest of N.C., No. 04-02-00612-CV , COURT OF

APPEALS OF TEXAS, FOURTH DISTRICT, SAN ANTONIO, 2002 Tex. App. LEXIS 7896, November 6, 2002

In re T. W., No. 07-02-0329-CV, COURT OF APPEALS OF TEXAS, SEVENTH DISTRICT, AMARILLO, 2002 Tex. App. LEXIS 6817, September 23, 2002

McGaughy v. Tex. Dep't of Pro. & Reg. Servs., No. 03-02-00492-CV, COURT OF APPEALS OF TEXAS, THIRD DISTRICT, AUSTIN, 2002 Tex. App. LEXIS 6369, August 30, 2002

In re C. E. B., No. 14-02-00594-CV, COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT, HOUSTON, 2002 Tex. App. LEXIS 4985, July 11, 2002, Rendered, July 11, 2002

In the Interest of C.M., No. 05-02-00278-CV, COURT OF APPEALS OF TEXAS, FIFTH DISTRICT, DALLAS, 2002 Tex. App. LEXIS 2664, April 16, 2002